87-32 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD W. MOREY and
DIANA W. MOREY,

Petitioners,

v.

BARRINGTON PRESS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD STUART MARGOLIS
TELLER, LEVIT & SILVERTRUST, P.C.
11 East Adams Street
8th Floor
Chicago, Illinois 60603
(312) 922-3030
Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

Whether a District Court's Order awarding, but not yet quantifying, attorneys' fees is a final order from which an appeal may be taken when the fee award arises not as a collateral matter under a separate statutory provision but instead results from the underlying cause of action (here a contract) which forms the basis of the dispute between the parties, as to which the Circuit Courts of Appeal are in conflict and as to which there is a conflict with a holding of the Supreme Court of the United States.

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OPINIONS BELOW

The opinion of the 7th Circuit Court of Appeals reversing the District Court's finding that no attorneys' fees were due is reported at 816 F.2d 341 (1987) (Appendix A). The District Court's finding that no attorneys' fees were due is reported at 635 F.Supp. 1257 (1986) (Appendix B). The 7th Circuit Court of Appeals affirmation of an award of attorneys' fees without amount is reported at 752 F.2d 307 (1985) (Appendix C). The slip opinion of the District Court in 81 C 1669 (N.D. Ill. April 22, 1983) awarding attorneys' fees without amount is unreported (Appendix D).

JURISDICTION

The opinion of the Court of Appeals was issued on April 14, 1987 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

Plaintiff, Respondent herein, brought its original action in the United States District Court for the Northern District of Illinois, Case No. 81 C 1669. The jurisdiction of the District Court was invoked under 28 U.S.C. §1332 because of diversity of citizenship, Plaintiff being a corporation, incorporated under the laws of the State of Illinois with its principal place of business in Illinois, and the Defendants being citizens of the State of Wisconsin.

Barrington Press, Inc. sought judgment on four promissory notes seeking principal, interest, and attorneys' fees. The Plaintiff prevailed at the trial court level, and the court awarded a judgment in the amount of "$140,000.00 plus accrued interest of $63,572.68 through January 31, 1983 plus reasonable attorneys' fees incurred in the collection of the amount for which the Defendants are liable as provided in the promissory notes". *Barrington Press, Inc. v. Morey*, 81 C 1669 (N.D. Ill. April 22, 1983) (Appendix D, p. D-7).

The Court neither took evidence nor heard any witnesses on the issue of attorneys' fees. The Defendants appealed this decision to the 7th Circuit Court of Appeals which affirmed the District Court's decision in *Barrington*

Press, Inc. v. Morey, 752 F.2d 307 (1985). (Appendix C). The question of attorneys' fees was not raised on the appeal, and the decision of the 7th Circuit Court of Appeals did not remand the case to the District Court.

The District Court, however, assumed jurisdiction to determine the question of attorneys' fees. The District Court after reviewing the law of the State of Illinois and hearing argument of counsel ruled that under the law of the State of Illinois, Plaintiff was entitled to no attorneys' fees. *Barrington Press, Inc. v. Morey*, 635 F.Supp. 1257 (1986). (Appendix B).

The Plaintiff appealed the decision claiming that the issue of liability on the question of attorneys' fees was finally determined on the prior appeal and that this was the law of the case, not subject to reconsideration. The 7th Circuit Court of Appeals agreed, reversing the trial court and remanding the case for a determination as to the amount of attorneys' fees due. *Barrington Press, Inc. v. Morey*, 816 F.2d 341 (1987). (Appendix A). The Defendants, Petitioners herein, take exception to this ruling, and petition this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I.

THERE IS AN IRRECONCILABLE CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL CONCERNING THE QUESTION PRESENTED IN THIS PETITION.

Each of the 12 Circuit Courts of Appeal has addressed the question presented in this petition. As of the date of this filing, four Circuits have followed the Petitioners'

view and have specifically ruled that a fee award which arises out of the underlying cause of action, not as a "collateral matter," is not appealable until the amount of that award has been quantified.

At present, five Circuits have taken the opposing view and have ruled that all requests for attorneys' fees are collateral to the main action and that a ruling on the merits is final and appealable without a determination as to the amount of attorneys' fees. The remaining three Circuit Courts of Appeal have recognized the issue but have not definitively placed themselves on one side or the other of the question presented on this petition.

A breakdown of the disputed Circuits is set out below. Those Circuits supporting the Petitioners' view are the following:

2nd Circuit

Lewis v. S.L. & E. Inc., 746 F.2d 141 (1984). The Court's order was not final where it contemplated new judgment quantifying attorneys' fees.

F.H. Krear & Co. v. Nineteen Named Trustees, 776 F.2d 1563 (1985). Contracts specifically provided for attorneys' fees. Judgment was not final until attorneys' fee award had been quantified.

3rd Circuit

Beckwith Machinery Co. v. Travelers Indemnity Co., 815 F.2d 286 (1987). In suit against insurer by insured, attorneys' fees incurred by insured when it was forced to defend underlying lawsuit were part of insured's cause of action, and an award finding in favor of the insured awarding attorneys' fees was not final and appealable until the amount of the award was quantified.

5th Circuit

Holmes v. J. Ray McDermott & Co. Inc., 682 F.2d 1143 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed.2d 956 (1983). Attorneys' fees were part of the relief sought by the plaintiff in an action, and the jury was charged on the issue. Order not final and appealable until amount of attorneys' fees determined.

Hooper v. Federal Deposit Insurance Corporation, 785 F.2d 1228 (1986). Attorneys' fees provided in note were part of the merits, and judgment was not appealable until amount of attorneys' fees had been determined.

Oxford Production Credit Association v. Duckworth, 689 F.2d 587 (1982). Attorneys' fees provided in note were an integral part of the merits. A determination of amount was a part of any final judgment.

Bilmar Drilling, Inc. v. IFG Leasing Co., 795 F.2d 1194 (1986). Attorneys' fees pursuant to lease were integral to cause of action. Fees under 28 U.S.C. §2202 were collateral.

Alcorn County, Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (1984). An award of liability under RICO is not final absent a determination of the amount of attorneys' fees.

Todd Shipyards Corp. v. Auto Transportation, S.A., 763 F.2d 745 (1985). An order without a specified amount of attorneys' fees in an action for breach of implied warranties of workmanlike performance is not final and appealable.

11th Circuit

McQurter v. City of Atlanta, 724 F.2d 881 (1984). Whether attorney's fees are collateral to an action or integral depends on the circumstances. Attorneys' fees under U.S.C. §1983 were collateral.

C.I.T. Corporation v. Nelson, 743 F.2d 774 (1984). Attorneys' fees pursuant to contract of guarantee were integral to merits, and District Court's order was not final until amount of attorneys' fees was determined.

Bank South Leasing, Inc. v. Williams, 769 F.2d 1497 (1985). Attorneys' fees provided in lease were integral to merits of the case. Withholding of judgment on the appropriateness and amount of attorneys' fees deprived judgment of finality.

Evans v. Johnson, 808 F.2d 1427 (1987). Award of attorneys' fees as part of the sanction under Rule 37(d) of the Federal Rules of Civil Procedure must be complete before order was appealable.

Fort v. Roadway Exp., Inc., 746 F.2d 744 (1984). District court's order finding plaintiff liable for attorney fees without determining amount thereof was not a final appealable judgment with regard to issue of attorney's fees, since district court contemplated further proceedings before entering a final judgment on the issue.

Those Circuits which oppose the Petitioner's view and have ruled that all fee awards are collateral to the merits of the case are the following:

6th Circuit

Morgan v. Union Metal Mfg., 757 F.2d 792 (1985).

7th Circuit

Exchange Nat. Bank of Chicago v. Daniels, 763 F.2d 286 (1985).

Bittner v. Sadoff & Rudoy Industries, 728 F.2d 820 (1984).

8th Circuit

United States v. Estridge, 797 F.2d 1454 (1986).

9th Circuit

Intern. Ass'n of Bridge, Etc. v. Madison Industries, 733 F.2d 656 (1984).

10th Circuit

Cox v. Flood, 683 F.2d 330 (1982).

Budinich v. Becton Dickinson and Co., 807 F.2d 155 (1986).

Those Circuits which recognize the collateral/integral distinction but have not committed themselves are the following:

D.C. Circuit

Shultz v. Crowley, 802 F.2d 498 (1986).

1st Circuit

Crossman v. Maccoccio, 792 F.2d 1 (1986).

4th Circuit

Hines v. IBG Intern., Inc., 813 F.2d 1331 (1987).

Bernstein By Bernstein v. Menard, 728 F.2d 252 (1984).

Langham-Hill Petroleum Inc. v. Southern Fuels Co., 813 F.2d 1327 (1987).

The listing above is representative and does not purport to be exhaustive of the opinions of the Circuit Courts of Appeal. On June 19, 1987, the Petitioner made a computerized, *Westlaw*, search of the cases dealing with the question presented on this petition and found 68 citations, the vast majority of which are reported decisions of the Circuit Courts of Appeal. A reading of these cases indicates that positions taken by the various Circuits are firmly entrenched and are not being swayed by decisions of other Circuits. Further, the number of cases dealing with

this issue have not abated and continue to arise with increased frequency (see *Cobb v. Miller*, ____ F.2d ___ (5th Cir. 1987) decided June 15, 1987 and, as yet, unreported). Also see *Loman Development Company, Inc. v. Daytona Hotel and Motel Suppliers Inc.*, reported at 817 F.2d 1533 (11th Cir. 1987).

The lack of a consistent rule throughout the Circuits has resulted in confusion amongst practitioners generating an inordinate number of appeals. These appeals continue to consume the time of the Courts of Appeal which, in turn, continue to issue opinions which confuse rather than clarify the issue. The Supreme Court should grant Petitioners' petition for writ of certiorari to establish uniformity amongst the various Circuits as it is clear from the recurring nature of the problem that this conflict will not be resolved absent a clarification by this Court.

II.

THE POSITION TAKEN BY THE 7TH CIRCUIT COURT OF APPEALS IS IN APPARENT CONFLICT TO THE DECISION OF THIS COURT IN *WHITE v. NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY*.

This Court in its decision in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445; 102 S.Ct. 1162; 71 L.Ed.2d 325 (1982) decided that a request for attorneys' fees under 42 U.S.C. Section 1988 "raises legal issues collateral to the main cause of action." *Ibid.* p. 451; p. 1166. The Court concluded that "the attorneys' fees allowed under Section 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved." *Ibid.* p. 452; p. 1166. While every decision which has commented on the question presented in this petition cites the authority of *White v. New Hampshire*, the 7th Circuit Court

of Appeals and the four other Circuits which oppose the position taken by the Petitioner ignore the plain meaning of that decision.

In particular, *Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286 (7th Cir. 1985) commenting on this Court's opinion in *White* states the following at page 293:

> We reject as altogether too metaphysical the distinction between fees that are "compensation for injury" and those that are not. All awards of fees make the prevailing party better off. Whether this benefit is "really" a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation, thus making redress of the underlying hurt, more likely and leaving the prevailing party with a greater net award, is a question of semantics rather than substance. Resolution of this question would depend on the legislative (or bargaining) history of a given statute or contract—if indeed such a question ever has a sensible answer. Jurisdictional rules should be framed to avoid such case-by-case decisions (citing authorities).

The decision then goes on at page 294 to conclude that all requests for fees must be treated as procedural equivalents with the exception of such peculiarities as patent and trade mark litigation.

It is the position of the Petitioners that the 7th Circuit Court of Appeals is only paying lip service to the opinion in *White* and has, in fact, discarded its teachings. Its "economic analysis" as to whether the prevailing party will be "better off" is not the point. At stake, is a policy of far greater importance which was well stated by Justice Frankfurter in *Cobbledick v. United States*, 309 U.S. 323; 324-325; 60 S.Ct. 540, 541; 84 L.Ed. 783 (1940).

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

This was the legal environment in which the Supreme Court made its carefully worded decision in *White*. If the Supreme Court had opted to effect a major erosion of the doctrine of finality as a condition to review by deciding that all petitions for fees were collateral to a judgment on the merits, it could have easily done so. To the contrary, it recognized the distinction between those fees which are part of the merits of the case and thereby integral to the decision of the Court and those which are created by statute and are collateral to the issue before the Court.

The Petitioners urge that the guidelines as set out in *White* are real, not metaphysical, and in keeping with the established procedures and traditions of the federal judiciary. Since there is an apparent conflict between the 7th

Circuit Court of Appeals and the decision of the United States Supreme Court in *White*, the Petitioners pray that this Court grant its petition for writ of certiorari.

III.

PETITIONERS WILL PREVAIL IF THE PETITION FOR WRIT OF CERTIORARI IS GRANTED AND THE DECISION OF THE 7TH CIRCUIT COURT OF APPEALS REVERSED.

The Respondent appealed to the 7th Circuit Court of Appeals the decision of the District Court ruling that it was not entitled to attorneys' fees under Illinois law. The 7th Circuit Court of Appeals reversed, noting that the District Court had no jurisdiction to find that no attorneys' fees were due because in a previous appeal a ruling of the District Court finding attorneys' fees, but not quantifying the amount, was affirmed.

Since it has been established as law of the case by the District Court that no attorneys' fees are due under Illinois law, a ruling by this Court that unquantified attorneys' fees pursuant to a contract between the parties did not constitute a final and appealable order will result in a reversal of the decision of the 7th Circuit Court of Appeals and a reinstatement of the order of the District Court finding no attorneys' fees due under Illinois law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD STUART MARGOLIS
TELLER, LEVIT & SILVERTRUST, P.C.
11 East Adams Street
8th Floor
Chicago, Illinois 60603
(312) 922-3030
Attorney for Petitioners

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2005

BARRINGTON PRESS, INC., an Illinois Corporation,
Plaintiff, Counterdefendant, and Appellant,

v.

RICHARD W. MOREY and DIANA W. MOREY,
Defendants, Counterplaintiffs, Cross-Complainants, and Appellees,

v.

PHILIP E. BASH,
Cross-Defendant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
No. 81 C 1669—**Stanley J. Roszkowski**, *Judge.*

ARGUED JANUARY 21, 1987—DECIDED APRIL 14, 1987

Before BAUER, *Chief Judge*, RIPPLE, *Circuit Judge*, and FAIRCHILD, *Senior Circuit Judge.*

FAIRCHILD, *Senior Circuit Judge.* This appeal is a sequel to *Barrington Press v. Morey*, 752 F.2d 307 (7th Cir. 1985) (*Barrington Press I*).[1] The judgment affirmed by this

[1] Jurisdiction was founded in diversity and the parties agreed that the law of Illinois governs substantive questions.

court in *Barrington Press I* included an award to plaintiff of "reasonable attorney's fees incurred in the collection of the amount for which the defendants are liable as provided in the promissory notes." *Barrington Press v. Morey*, No. 81 C 1669, order at 9 (N.D. Ill., Apr. 22, 1983). All that remained was a determination of the amount of fees due. Anomalously, perhaps, reservation of the determination of the amount of attorney's fees does not deprive the initial judgment of finality. *See Exchange Nat'l Bank of Chicago v. Daniels*, 763 F.2d 286, 291-92 (7th Cir. 1985); *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 827 (7th Cir. 1984); *Swanson v. American Consumer Indus., Inc.*, 517 F.2d 555, 561 (7th Cir. 1975).

The opinion in *Barrington Press I* referred to the award of attorney's fees. However, there was no further discussion, doubtless because the defendants did not challenge the award. We conclude that the plaintiff's entitlement to attorney's fees, applying the law of Illinois, was resolved by the judgment and affirmed by this court. It thus became the law of the case.[2] *See* 5B C.J.S. *Appeal & Error* § 1964 (1958) (law of the case applies when appellate court affirms decision of lower court and lower court cannot reconsider the matter decided, even if matter was decided implicitly rather than explicitly); 5 Am. Jur.2d *Appeal and Error* §§ 744-746 (1962). The mandate of this court affirming the judgment amounted to a direction to the district court to determine the amount of the attorney's fees, entitlement to which had been awarded.

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[2] The law of the case doctrine precludes reconsideration of a matter already decided "unless one of three 'exceptional circumstances' exists: the evidence in a subsequent trial was substantially different; controlling authority has since made a contrary decision of law applicable to such issues; or the decision was clearly erroneous, and would work a substantial injustice." *Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir. 1985) (citing *Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983)). Defendants presented no evidence that any of these exceptional circumstances existed in this case.

At about the time the defendants appealed from the judgment against them, plaintiff filed a fee petition, seeking to have the amount determined by the district court. The determination awaited the outcome of the appeal. The opinion in *Terket v. Lund*, 623 F.2d 29, 33-34 (7th Cir. 1980), may well suggest that it would have been more efficient for the district court to determine the amount of the fee promptly, so that an appeal could have been taken and consolidated with the appeal from the judgment. It did not mean there was any requirement that that process be followed.

Ultimately the defendants persuaded the district court that it could properly reexamine the merits of plaintiffs' entitlement to a fee, and that under the facts of the case, the award was contrary to the law of Illinois. The district court thus denied the plaintiffs' petition for attorney's fees and this appeal is from that order.

The defendants had given four cognovit notes for the purchase price sued for and recovered in *Barrington Press I*. The notes provided in pertinent part:

> The undersigned individuals authorize, irrevocably, attorney of any court of record to appear for the undersigned individuals in such court if this note is not paid when due, and any time thereafter, whether in term time or vacation, to confess judgment, without process, in favor of the holder of this note, for such amount as may appear to be due and unpaid thereon, together with reasonable costs of collection, *including reasonable attorney's fees*, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof. The undersigned individuals waive presentment for payment, notice of dishonor and protest.

(emphasis added). The defendants now contend that under Illinois law, plaintiff is not entitled to attorney's fees under the notes because plaintiff "proceeded other than

by way of confession of judgment." *Thread and Gage Co., Inc. v. Kucinski*, 116 Ill. App.3d 178, 186 (1st Dist. 1983). Plaintiff contests this contention, but we do not resolve the dispute because the contention is raised too late.

Defendants did not contest the award of attorney's fees before the district court prior to judgment, nor in their Rule 59(e) motion to amend the judgment in other respects. Had they raised it on appeal in *Barrington Press I*, this court may well have held it had been waived. *See Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260, 268 (7th Cir. 1986) (arguments made on appeal were untimely because they had not been raised in the district court); *Haynes v. United States*, 418 F.2d 1380, 1382 (Ct. Cl. 1969) ("[i]t is a general rule of law that failure to preserve an error, either at the trial level or before an appellate court, will cause that point to be lost for any subsequent appeal"). In any event, defendants did not raise the argument and the judgment was affirmed without modification.

On this appeal, defendants seek to preserve their position by arguing that the district court's order now appealed from was consistent with the judgment and was equivalent to finding that the amount of "reasonable attorney's fees incurred in the collection of the amount for which the defendants are liable as provided in the promissory notes" is zero, since no work was performed in connection with entering judgment upon confession. To make the argument, defendants put an unnatural and strained construction on the phrase "as provided in the promissory notes." Neither their interpretation of that phrase, nor their rationale of finding an amount equal to zero was followed by the district court.

We think the case remains in the same posture as it had after the judgment was entered, and that a determination of a reasonable attorney's fee incurred in the collection was and is all that remains to be done.

The order appealed from is REVERSED and the cause REMANDED for further proceedings.

RIPPLE, *Circuit Judge*, concurring. I join the judgment and opinion of the court. I agree that, on these facts, eligibility for attorneys' fees was encompassed within the judgment before this court in *Barrington I*. I write separately simply to emphasize that our holding today leaves undisturbed the settled law of this circuit that the matter of attorneys' fees need not be determined at the time that a final, appealable judgment is entered on the merits. The district court may defer ruling on attorneys' fees until a later time and, upon entry of a separate judgment addressing attorneys' fees, a separate appeal may be taken to this court. *See Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 294 (7th Cir. 1985); *Swanson v. American Consumer Indus., Inc.*, 517 F.2d 555, 561 (7th Cir. 1975).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BARRINGTON PRESS, INC., an Illinois corporation,

Plaintiff,

No. 81 C 1669 vs.

RICHARD W. MOREY and DIANA W. MOREY,

Defendants.

ORDER

Before the court is plaintiff's petition for attorney's fees. For the reasons stated herein, plaintiff's petition is denied.

DISCUSSION

The sole issue left to be decided in this case is whether under Illinois law a confession of judgment clause in a promissory note that provides for "reasonable costs of collection, including reasonable attorney's fees" will support an award of attorney's fees when the note-holder obtains a judgment on the note other than by confession. While each side argued their respective viewpoints as supported by Illinois case law, it was not until the completion of briefing on this issue that a case directly on point was brought to this court's attention.

In *Thread and Gage Company, Inc. v. Kucinski*, 116 Ill. App. 3d 178 (1st Dist. 1983), the note in question "included a confession of judgment clause authorizing entry

of judgment for the amount due, together with costs and 20% of such amount as attorney's fees." *Id.* at 185. The note-holder initiated suit rather than proceeding by confession. In denying the note-holder attorney's fees following the successful suit on the note, the Illinois Appellate Court stated:

> The well-established rule in this State is that attorney fees are ordinarily not recoverable unless specifically authorized by statute or contract . . . . A court may not award attorney fees as a matter of contractual construction in the absence of specific language. . . . Here, no provision in the agreement other than the confession of judgment clause, authorized attorney fees. [The note holder], having proceeded other than by way of confession of judgment is therefore not entitled to attorney fees.

Id. at 185-86. (citations omitted).

Thus the only Illinois case brought to this court's attention involving circumstances for all practical purposes identical to those of this case held that the note-holder is *not* entitled to attorney's fees. Were this court writing on a clean slate, it might reach a different conclusion given the limited procedural differences between a suit initiated by opening a confession judgment under Illinois Supreme Court Rule 276 and one brought initially on the note. Throughout this case, however, the parties have agreed that Illinois law governs the substantive issues. Since plaintiff's entitlement to fees is a substantive issue and since this court cannot say *Thread and Gage* is obviously an incorrect statement of the law, this court will defer to the Illinois Appellate Court decision and deny plaintiff fees.

Plaintiff's argument that this court is without jurisdiction to consider the merits of the fee award is in error. While the intent of this court has always been merely to determine the amount of fees owing plaintiff, recent Seventh Circuit authority conclusively establishes that this court nonetheless retains jurisdiction to consider the

merits of the fee award. *See Patzer v. Board of Regents of the University of Wisconsin System*, 763 F.2d 851, 857 (7th Cir. 1985); *Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286 (7th Cir. 1985). Admittedly, the Seventh Circuit mentioned the fee award in affirming the decision on the merits. Nothing in the Seventh Circuit decision or in the argument of the parties even remotely suggests that the Seventh Circuit considered the merits of the fee award. This court is thus not precluded from deciding the merits of the plaintiff's fee petition.[1]

Neither can an amended pleading help plaintiff. Even assuming that an amendment is available at this late stage, nothing can change the fact that plaintiff chose not to proceed by confession of judgment. Under *Thread and Gage*, this fact is determinative to the fees issue.

CONCLUSION

For the reasons stated herein, plaintiff's petition for attorney's fees is denied.

ENTER:

/s/ STANLEY J. ROSZKOWSKI, Judge
United States District Court

DATED: May 15, 1986

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[1] This determination is of course appealable under *Daniels* and *Patzer*.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-2501

BARRINGTON PRESS, INC.,
an Illinois corporation,

Plaintiff-Counterdefendant-Appellee,

v.

RICHARD W. MOREY and
DIANA W. MOREY,

Defendants-Counterplaintiffs-Cross-Complainants-Appellants,

v.

PHILLIP E. BASH,

Cross-Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81-C-1669—Stanley J. Roszkowski, *Judge.*

ARGUED APRIL 13, 1984—DECIDED JANUARY 10, 1985

Before WOOD and CUDAHY, *Circuit Judges*, and NICHOLS, *Senior Circuit Judge.**

WOOD, *Circuit Judge.*** This case involves a contract dispute over the sale of a small publishing business. Plaintiff-Appellee, Barrington Press, Inc. ("Barrington"), an assignee to seller A.B. Morse Company ("Morse"), sued buyers, Defendants-Appellants, Richard and Diana Morey (the "Moreys"), for the balance due on the sales contract. The Moreys defended on grounds that the contract is void due to fraudulent inducement. Furthermore, they counterclaimed against Barrington and cross-claimed against appellee Bash, president of Morse at the time of the sale, for fraud and damages. The district court found for plaintiff in all respects, ordering payment of the balance of the contract price for the publishing business plus interest and attorneys fees. Defendants filed a Rule 59(e) motion to alter or amend judgment. The district court denied the 59(e) motion. Defendants then appealed to this court the district court's order finding in favor of appellee in all respects and its order denying appellants' Rule 59(e) motion to alter or amend judgment.

I.

Negotiations for the sale of Morse's Countryside books began between seller, Bash (Cross-Defendant-Appellee) and buyers, the Moreys (Defendants-Appellants) in late 1979 or early 1980. The Countryside books included gardening books, craft books, Country Home Guides, Small Farm Guides, a Blooming Success book, and a Bartender's Guide. The Moreys asked Bash to send them sales, costs, inventory, and gross profit figures for the gardening books in the Countryside line. Bash responded with a September 24, 1980 letter. The letter confirmed the recent conver-

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* The Honorable Philip Nichols, Jr., Senior Circuit Judge of the United States Court of Appeals for the Federal Circuit, is sitting by designation.

** Judge Nichols made substantial contributions to this opinion.

sation between the parties on the subject of the Countryside gardening books and Morse's plans to sell the gardening books. The letter also informed the Moreys that the Countryside gardening book inventories were very slow moving and that sales were declining. An appendix to the letter listed the titles of Countryside gardening books and the sales volume for each title for 1978 through the first eight months of 1980. Another appendix to the letter gave the total dollar sales, costs of goods, and gross profits for years 1975 through 1979 for the entire line of Countryside books (i.e., gardening as well as non-gardening books). However, read in the context of the letter which only discussed the Countryside gardening books, the appendix appeared to reflect sales, costs, and profits for gardening books alone. A final appendix purported to give *projected* sales, costs, and gross profits for 1980 through 1983 for gardening books alone, where in fact it gave the projected figures for the entire Countryside line.

The Moreys had some expertise in the area of gardening book publishing, at least in part, from their experience with publishing a gardening magazine in which Countryside gardening books had been advertised. At trial they admitted to substantial knowledge of gardening book publishing.

On December 4, 1980, Morse and the Moreys executed a purchase agreement for the Countryside gardening books for the price of $150,000, $10,000 to be paid prior to execution of the contract with the balance to be paid in four installments.

The Moreys received delivery of all items included in the purchase agreement in December, 1980 and January, 1981. Nonetheless, they have not made further payment on the $140,000 balance due.

On this appeal the Moreys argue that the district court imposed an improper burden of proof with respect to their fraud defense and claims. They also argue that the district court's findings regarding the absence of fraud by Bash were clearly erroneous.

II.

We disagree with appellants that the district court erred in requiring them to prove their defense and claims of fraud by clear and convincing evidence. Appellants argue that *Racine Fuel Co. v. Rawlins*, 377 Ill. 375, 36 N.E.2d 710 (1941), cited by the district court, establishes a preponderance of the evidence standard for fraud. *Racine Fuel*, however, unequivocally states that "[f]raud is not presumed but must be proved . . . by clear and convincing evidence," 377 Ill. at 380, 36 N.E.2d at 713, and the case has subsequently been cited by the Illinois Supreme Court for that proposition. *See Ray v. Winter*, 67 Ill. 2d 296, 303-04, 367 N.E.2d 678, 682 (1977). The section of *Racine Fuel* appellants cite grudgingly approves a jury instruction given to distinguish the burden of proof in a civil fraud action from that in a criminal case. 377 Ill. at 383, 36 N.E.2d at 714.

Although there has been some question about the appropriate burden to establish fraud under Illinois law, *see, e.g., Harry Alter Co. v. Chrysler Corp.*, 285 F.2d 903, 906 (7th Cir. 1961) (citing *Barrett v. Shanks*, 382 Ill. 434, 47 N.E.2d 481 (1943)); *L&S Enterprises v. Great American Insurance Co.*, 454 F.2d 457 (7th Cir. 1971) (fraud in a proof of loss need only be proven by a preponderance of the evidence when advanced as a defense to an insurance claim, relying on *Esquire Restaurant Inc. v. Commonwealth Insurance Co. of New York*, 393 F.2d 111 (7th Cir. 1968) (citing *Sundquist v. Hardware Mutual Fire Insurance Co.*, 371 Ill. 360, 21 N.E.2d 297 (1939)), the Illinois Supreme Court has recently affirmed the clear and convincing standard. *See Hofmann v. Hofmann*, 94 Ill. 2d 205, 222, 446 N.E.2d 499, 506 (1983); *see also Merit Insurance Co. v. Colao*, 603 F.2d 654, 658 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); *Merit Insurance Co. v. Colao*, 603 F.2d at 660 (Wood, J., dissenting in part). "That standard requires evidence stronger than that which merely predominates but does not require proof beyond a reasonable doubt." *Otmer v. Zamora*, 94 Ill. App. 3d 651, 655, 418 N.E.2d 506, 509 (1981). We hold that the district court

committed no error in requiring clear and convincing proof of fraud.

III.

The Moreys allege that Bash, as agent of Morse, fraudulently misrepresented various sales figures and the future sales and profitability of the horticultural books in the Countryside line. Although we are not certain, the district court's analysis of the alleged fraud seems to suggest that the court rejected the allegation, at least in part, on grounds that the evidence was less than clear and convincing that the seller made a material misrepresentation. Although it is somewhat unclear, the district court appears to have found no material misrepresentation because it found neither *misrepresentation* nor *materiality*. We uphold the finding of no material misrepresentation on grounds of lack of materiality.

The record indicates that the seller indeed did misrepresent to the buyer in a September 24, 1980 letter that the gross dollar sales and profits of the Countryside gardening books for 1975 through 1980 were greater than in fact they were. This misrepresentation was indefensible and to the extent the district court's finding of no material misrepresentation rests upon a finding of no misrepresentation it is clearly erroneous.[1]

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[1] Appellants argue that the projections of future sales and profitability of the gardening books in the Countryside line, given in the last appendix to the same September 24 letter, constitute a misrepresentation since they include projections for gardening as well as non-gardening books. These projections cannot ground a fraud claim, however, because they are predictions or opinions regarding future business performance, not representations of pre-existing material facts. *Pustelniak v. Vilimas*, 352 Ill. 270, 275 (1933). Appellants' reliance on the exception to this pre-existing material fact requirement given in *Willis v. Atkins*, 412 Ill. 245, 260 (1952) and *Carroll v. First National Bank of Lincolnwood*, 413 F.2d 353, 358 (7th Cir. 1969) is misplaced since those cases

(Footnote continued on following page)

However, the district court could have found no material misrepresentation on grounds of lack of materiality and we cannot say that such a finding is clearly erroneous. A misrepresentation is "material" if "it relates to a matter upon which plaintiff could be expected to rely in determining to engage in the conduct in question." *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*, 72 Ill. App. 3d 37, 49 (1979); *see also Lytton v. Cole*, 54 Ill. App. 2d 161, 176 (1964). The district court found that defendants had "ample opportunity to review the marketability of plaintiff's Countryside Books," had "substantial knowledge" of the market, and had other accurate figures and statements from the seller reflecting the problems with the horticultural line of Countryside books. These findings are supported by the record. In the context of these findings a finding that the misrepresentation regarding gross dollar sales and profits is immaterial is not clearly erroneous.

Having upheld the district court's finding of no *material* misrepresentation we need not reach the question of whether the court's finding that the misrepresentation was not made knowingly is clearly erroneous.

At this appellate stage appellants were at a great disadvantage. To prevail they had to overcome the clear error rule and establish in the record all the elements of a fraud claim by clear and convincing evidence. This they have failed to do. Although we find clear error in a finding of no misrepresentation we must nonetheless affirm on the ground that it was not clearly erroneous to find that the misrepresentation was not material.

AFFIRMED.

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[1] *continued*
involved promises of future *conduct* by the seller, whereas here the misrepresentation regards the seller's projections or *opinion* as to the business's future sales and profitability, something the seller had no control over after selling the business.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 1669

BARRINGTON PRESS, INC.,
an Illinois corporation,

Plaintiff, Counterdefendant,

vs.

RICHARD W. MOREY and
DIANA W. MOREY,

Defendants, Counterplaintiffs,
Cross-Complainants,

vs.

PHILIP E. BASH,

Cross-Defendant.

FINDINGS OF FACT

The case before the court concerns a dispute over a sales contract for a publishing business. The plaintiff alleges that it has performed all of its obligations under the contract, yet the defendants have not made payment in full. Plaintiff seeks to recover the $140,000.00 balance due, plus interest on the promissory notes in the amount of $63,572.78 through January 31, 1983, and reasonable attorneys' fees as provided in the promissory notes.

Defendants admit they agreed to purchase the business, but argue that they need not pay the balance due, because plaintiff fraudulently misrepresented the value of the business. Defendants, in their counterclaim, request that the contract be held void and unenforceable and seek an award of $203,628.00 based on actual damages resulting from this misrepresentation, and punitive damages of $200,000.00, based on plaintiff's allegedly wilful and malicious conduct.

This case was tried before the bench. After careful consideration of the testimony, exhibits and applicable law, the court finds in favor of the plaintiff and against the defendant in all respects. This opinion constitutes the court's findings of fact and conclusions of law.

The plaintiff and counter-defendant, Barrington Press, Inc. ("Barrington"), is a corporation incorporated under the laws of the State of Illinois and has its principal place of business in the State of Illinois. The cross-defendant, Philip E. Bash ("Bash"), was at all times relevant, the President of A. B. Morse Company and acted as Morse's duly authorized agent and representative. The defendants, Richard W. Morey and Diana W. Morey ("defendants"), are citizens of a state other than the State of Illinois. The matter in controversy before the court, exclusive of interest and costs, exceeds $10,000.00.

On December 4, 1980, A. B. Morse Company ("Morse") and defendants executed a purchase agreement for the Countryside Gardening Books. The purchase price of $150,000.00 included $100,000.00 for inventory on a production cost basis; $37,000.00 for assignment of copyrights; and $13,000.00 for a covenant not to compete and consulting fees. Defendants gave $10,000.00 to Bash, prior to execution of the contract, and executed four promissory notes for the balance. Bash, as Morse's president, assigned to Barrington the rights under the purchase agreement and the promissory notes. Defendants received delivery in December 1980 and January 1981, of all items included in the purchase agreement, i.e. an inventory of $100,000.00 on a production cost basis, an assignment of copyrights,

an agreement not to compete and available consulting services. Morse therefore performed all the conditions required under the purchase agreement and have not since competed with defendants. Defendants nevertheless have made no further payment on the $140,000.00 balance due.

The history of negotiations leading up to the agreement is as follows. Negotiations between Bash and defendants began in late 1979 or early 1980. Defendants publish gardening magazines and expressed interest in the Countryside Books published by A. B. Morse Company. They asked Bash to provide them with figures to help them decide whether to purchase this line of books. On September 24, 1980, Bash sent defendants a letter which stated Morse's intention to sell the horticultural book line. The letter accurately listed the titles of the Countryside Gardening Books; the number of these books sold in 1978, 1979, and eight months of 1980, and provided figures on sales, direct cost, inventory, gross profit and projected sales.

Defendants decided that they were interested in purchasing the publishing business and further correspondence and meetings followed.

On October 15, 1980, Bash, in response to defendants' request, replied that there was no separate tax return for Countryside Publications and no Profit and Loss Statement.

Plaintiffs also informed defendants, prior to the signing of the purchase agreement, that the Countryside inventory had some slow moving items and that sales had been declining. The letter of September 24, 1980, for example, referred to the necessity of new marketing approaches and stated, "It seems appropriate, therefore, to find a buyer who is capable of promoting and marketing the horticultural books to their best advantage." Plaintiffs provided defendants with sales data, marketing records, correspondence and distribution files reflecting distribution problems of the Countryside Books. Defendants admitted that they had no previous expertise in the book business. However, at trial, they admitted they had sub-

stantial knowledge of the market for these books before they purchased the business. Mr. Morey stated that, as a result of advertising the Countryside Books in his trade journal, he had an idea of their market receptivity prior to the purchase.

After taking over the business, defendants marketed them as Morse had done before the sale. Defendants soon found the books unmarketable through normal sales channels and attempted to meet with Bash in February 1981 to discuss the problem and to possibly adjust the amount due. Bash refused to meet with the defendants until they brought their payments up to date. By the end of 1981, defendants remaindered the bulk of the book inventory, but continued to operate the publishing business as A. B. Morse Company. Defendants, in their 1980 federal income tax return, claimed deductions for amortization of copyrights and the non-compete agreement and a loss on the remainders of the books purchased from Morse. They did not offer to return the inventory or copyrights to plaintiff and did not request a recission of the purchase agreement.

CONCLUSIONS OF LAW

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1332.

The parties admit that a contract existed between Morse and the Moreys. This court agrees. The necessary elements of mutual assent and a valid consideration or its substitute existed, and are evidenced by the purchase agreement of December 4, 1980 and the four promissory notes signed by the defendants. The issue before the court is whether plaintiff fraudulently induced defendants to enter the contract, thus rendering it void, invalid, and otherwise unenforceable. Defendants claim that plaintiff misrepresented the sales figures for the Countryside line of books, in general, and the horticultural books, in particular.

Fraud in the inducement, if proven, would constitute a valid defense to the enforcement of this contract. Fraud in the inducement makes contracts voidable at the option of the injured party. *Bressler Ice Cream Co. v. Millionaire's Club, Inc.*, 71 Ill.App.2d 342, 218 N.E.2d 981 (1966). The elements of fraud are: (1) a false representation of a material fact; (2) made with knowledge of its falsity and intent and it shall be acted upon; (3) which is acted upon to the injury of the other contracting party. *Johnston v. Shockey*, 335 Ill. 363, 167 N.E. 54 (1929). *See also Mother Earth Ltd. v. Strawberry Camel, Ltd.*, 72 Ill.App.3d 37, 390 N.E.2d 393 (1979); *Shanle v. Moll*, 25 Ill.App.3d 113, 323 N.E.2d 148 (1975).

The Moreys claim that Barrington knowingly misrepresented the books' sales figures, that they relied on this misrepresentation in deciding to purchase the business, and that they suffered a loss when forced to remainder the books. Plaintiffs claim that defendants failed to prove that false statements were made or that the defendants suffered any damages which were the proximate result of any alleged misrepresentation.

Based upon the findings of fact, this court holds that plaintiff made no material misrepresentation upon which defendants may set aside the contract.

Fraud will not be presumed, but must be affirmatively proved. *Eagle Indem. Co. v. Gill*, 108 F.Supp. 936 (E.D. Ill. 1952); *Bernstein v. Bernstein*, 398 Ill. 52, 74 N.E.2d 785 (1947). Defendants must prove by clear and convincing evidence that they were fraudulently induced to enter into the purchase agreement. *Racine Fuel Co. v. Rawlins*, 377 Ill. 375, 36 N.E.2d 710 (1941). Each element of fraud must be proved by the party asserting it. *Michuda v. Sanitary Dist. of Chicago*, 305 Ill.App. 314, 27 N.E.2d 582 (1940). Fraud can be proven by circumstances, but the circumstantial evidence should be sufficiently strong to convince the mind that the fraud existed. *Connolly v. Gishwiller*, 162 F.2d 428 (7th Cir. 1947), *cert. denied*, 332 U.S. 825 (1947).

Defendants have failed to meet this burden. The parties negotiations, carried out through correspondence, telephonic communications, and personal meetings, were "arms-length" transactions. Defendants had ample opportunity to review the marketability of plaintiff's Countryside Books. Plaintiffs presented accurate sales figures for the horticultural and non-horticultural lines of books. Defendants were made aware that the market was very slow and that new marketing strategies were needed. In fact, plaintiff so informed defendant in the letter of September 24, 1980. Mr. Morey, in deposition, admitted that his knowledge of the market was substantial before he bought the business, impeaching his later testimony at trial that his knowledge of the market was not extensive. Defendants have failed to prove that any material fact was untrue and that plaintiff knew and believed such fact was untrue. Defendants thus failed to establish by clear and convincing evidence that either Bash or Morse fraudulently misrepresented any material facts to the defendants prior to the purchase.

Defendants' alternative argument, that they may be excused from performance because plaintiff failed to fulfill a condition precedent to the contract, fails for the same reason. The alleged condition precedent was that the plaintiff supply materially accurate and correct representations and warranties. It is not necessary to rule on the legal validity of this argument, as the court has already ruled that Barrington made no misrepresentations to the Moreys.[1]

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[1] The court agrees with defendants that plaintiff is not entitled to recover under a theory of *quantum meruit*, or a contract implied in law. Establishment of an implied contract depends upon (1) performance of services, (2) the reasonable value of those services, and (3) the receipt by the defendant from the plaintiff of a benefit which it would be unjust for him to retain without paying the plaintiff. *O'Neil and Santa Claus, Ltd. v. Xtra Value*, 51 Ill.App.3d 11 (1977). Further, it is well established that if there is a contract covering the matter at hand, the contract must take

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As they have failed to prove their counterclaim, defendants' requested assessment of damages, actual and punitive, are denied.

The court adjudges defendants liable to plaintiff under the terms of the purchase agreement of December 4, 1980 in the amount of $140,000 plus accured interest of $63,572.78 through January 31, 1983, plus reasonable attorney's fees incurred in the collection of the amount for which the defendants are liable as provided in the promissory notes.

It is so ordered.

ENTER:

/s/ STANLEY J. ROSZKOWSKI, Judge
United States District Court

DATED: April 22, 1983

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[1] *continued*

precedence and there can be no recovery on the basis of quantum meruit. *Telander v. Posejpal*, 94 Ill.App.3d 616, 627, 418 N.E. 2d 444 (1981); *Protestant Hospital Builders Club v. Goedde*, 98 Ill. App.3d 1028, 1031, 424 N.E.2d 1302 (1981); *Slater v. Jacobs*, 56 Ill.App.3d 636, 638, 371 N.E.2d 1054 (1977).

In the instant case, the purchase agreement between the parties is a valid contract and the plaintiff is entitled to enforcement of its terms. There is no need to find an implied contract, or base plaintiff's rights on theories of unjust enrichment.